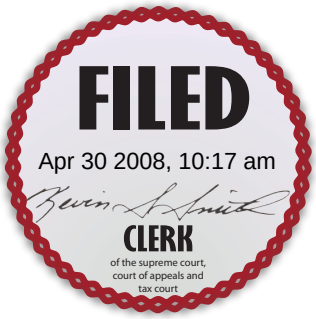

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IN THE COURT OF APPEALS OF INDIANA

OTIS FRESHWATER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0710-CR-863
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0701-FB-7

April 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Otis Freshwater appeals his convictions, following a jury trial, of one count of Class B felony Armed Robbery[1] and one count of Class D felony Residential Entry.[2] Freshwater claims the trial court erred in admitting hearsay evidence over his objection. Freshwater also claims the trial court erred in denying his motion for a directed verdict on the residential entry charge. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY[3]

In January of 2007, Oradee "Bay" McCray lived in the downstairs apartment in a duplex located on South Boots Street in Marion with her adult son, Anderson. Another of McCray's adult sons, Freshwater, lived in the upstairs apartment. The address of McCray's apartment was 2301 South Boots Street. The address of Freshwater's apartment was 2303 South Boots Street. Each apartment had a separate entrance, and the apartments were not connected internally.

At approximately 1:00 a.m. on January 9, 2007, Freshwater pushed open the door and entered McCray's home uninvited. Freshwater demanded that McCray give him money. When McCray refused, Freshwater held up a butcher knife, pointed it toward McCray, repeated his demand for money, and told McCray that if she did not give him

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[1] Ind. Code § 35-42-5-1(1) (2006).

[2] Ind. Code § 35-43-2-1.5 (2006).

[3] We held oral argument in this case on April 15, 2008 at Heritage Christian High School. We wish to thank counsel for their advocacy and extend our appreciation to the faculty, staff, and students of Heritage Christian for their fine hospitality.

her money, he would kill her. McCray gave Freshwater $107.00. After taking the money, Freshwater left McCray's home.

Afraid, McCray ran to Patricia Rogers's home nearby, requested that Rogers call 911, and repeatedly said, "[H]e's tryin' [to] kill me." Tr. at 192. Rogers called 911. During the 911 call, McCray spoke with the dispatcher, telling her that "he walking around with a knife … talking about he'll kill us if we don't give him some money." Ex. 6-Transcript p. 2. McCray returned home after the dispatcher assured her that the police would arrive any moment.

Among other officers, Marion Police Officer Leland Smith responded to McCray's residence. Upon his arrival, Officer Smith attended to McCray. McCray seemed nervous, pacing from side to side, repeatedly mumbling, "[H]e robbed me, he took a hundred an' seven dollars ($107.00), … he robbed me." Tr. p. 139. McCray was quite upset, but, nevertheless, was able to unequivocally describe the incident, identifying Freshwater as the perpetrator. Officer Smith asked McCray to give a victim's statement, and she agreed so long as Officer Smith transcribed it for her because she could not write well. Officer Smith agreed and transcribed McCray's statement "word for word." Tr. p. 145. McCray then signed the statement.

Additionally, Detective Brian Sharp of the Marion Police Department met with McCray on three separate occasions. During these meetings, McCray gave statements pertaining to the robbery that were factually consistent with the statement she made to Officer Smith immediately following the robbery. Detective Sharp also interviewed

Freshwater, who claimed that on the evening in question, McCray gave him twenty dollars for food.

On January 18, 2007, Freshwater was charged with one count of armed robbery as a Class B felony and one count of residential entry as a Class D felony. A jury trial commenced on May 21, 2007. At the conclusion of the State's case-in-chief, Freshwater moved for a directed verdict on the residential entry charge. The trial court denied Freshwater's motion, finding that because there was contradictory evidence, the issue should be left to the jury to decide. Freshwater rested without presenting any evidence, and the case was submitted to the jury. On May 22, 2007, the jury found Freshwater guilty as charged. On June 18, 2007, the trial court imposed concurrent sentences of twenty years of incarceration in the Department of Correction for the armed robbery charge and three years for the residential entry charge. This appeal follows.

DISCUSSION AND DECISION

I. Admission of Evidence

Freshwater contends that the trial court abused its discretion in admitting Officer Smith's testimony relating to the statements McCray made immediately following the robbery because such statements were inadmissible hearsay. The State argues that the trial court did not abuse its discretion in admitting Officer Smith's testimony because McCray's statements fell under the excited utterance exception to the hearsay rule. The State additionally argues that even if the admission of Officer Smith's testimony was an abuse of the trial court's discretion, the error was harmless because Officer Smith's testimony was merely cumulative of other evidence properly admitted at trial. It is well-

settled in Indiana that the admission and exclusion of evidence fall within the sound discretion of the trial court, and on appeal, we review the admission of evidence only for an abuse of discretion. *Mathis v. State*, 859 N.E.2d 1275, 1279 (Ind. Ct. App. 2007). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id*.

"The Indiana Rules of Evidence define hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." *Montgomery v. State*, 694 N.E.2d 1137, 1140 (Ind. 1998). Hearsay is generally not admissible in evidence. *Id*. However, the Indiana Rules of Evidence provide a number of exceptions, under which statements amounting to hearsay are admissible as evidence at trial. *See* Ind. Evidence Rules 803 and 804. An excited utterance is one such exception. Evid. R. 803(2).

"An excited utterance is defined as follows: 'A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" *Id*. (quoting Evid. R. 803(2)). "For a statement to be admitted under Indiana Rule of Evidence 803(2), the exception for an excited utterance, three elements must be shown: (1) a startling event; (2) a statement made by a declarant while under the stress of excitement caused by the event; and (3) that the statement relates to the event." *Fowler v. State*, 829 N.E.2d 459, 463 (Ind. 2005). "The ultimate issue is whether the statement is deemed reliable because of its spontaneity and lack of thoughtful reflection and deliberation." *Mathis*, 859 N.E.2d at 1279. The amount of time that has passed between the event and the statement is not dispositive; rather, the issue is whether

the declarant was still under the stress of excitement caused by the startling event when the statement was made. *Id*.

Freshwater argues that McCray's statements do not fall under the excited utterance exception to the hearsay rule because McCray had voluntarily returned to her home before giving the statement and was therefore no longer under the stress of excitement caused by the robbery. Freshwater's position is unpersuasive, however, because the amount of time that has passed between the robbery and McCray's statement to Officer Smith is not dispositive; rather, the issue is whether McCray was still under the stress of excitement caused by the robbery when the statement was made. *See Mathis*, 859 N.E.2d at 1279.

In *Fowler*, the Indiana Supreme Court considered whether statements made under similar circumstances fell under the excited utterance exception to the hearsay rule. The facts in *Fowler* established that the officer involved testified that he responded to the incident within five minutes of receiving the dispatch and that he spoke with the victim no more than ten minutes after his arrival. *Fowler*, 829 N.E.2d at 463. Thus, no more than fifteen minutes had elapsed between the time of the 911 call reporting the incident and the victim's statements to the officer. *Id*. The victim appeared to be still under the stress caused by the event. Based on the officer's testimony and the evidence surrounding the victim's state of being at the time she made the statements, the Supreme Court concluded that the officer's "account of the victim's report to him was properly admitted as an excited utterance insofar as the state rules of evidence are concerned." *Id*. at 464.

Similarly here, Officer Smith arrived within minutes of receiving the dispatch and spoke to McCray within minutes of his arrival. Officer Smith testified that McCray was visably upset and her conduct suggested that she remained under the stress caused by the robbery. Additionally, Rogers's testimony indicated that McCray was extremely upset when she left Rogers's home to return to 2301 South Boots Street. Also, the evidence established that McCray only returned home after the 911 dispatcher assured her that the police would arrive at her home momentarily. Given Officer Smith's and Rogers's testimony concerning McCray's physical state immediately prior to and at the time of her statements concerning the robbery, and in light of the Supreme Court's conclusion in *Fowler*, we conclude that Officer Smith's account of McCray's statements to him were properly admitted as an excited utterance insofar as the rules of evidence are concerned.[4] *See id.*

Furthermore, in *Montgomery*, the Indiana Supreme Court determined that errors in the admission of evidence, including hearsay, are to be disregarded as harmless unless they affect the substantial rights of a party. 694 N.E.2d at 1140. In determining whether an evidentiary ruling has affected an appellant's substantial rights, we assess the probable impact of the evidence on the jury. *Id.* The admission of hearsay is not grounds for reversal where it is merely cumulative of other evidence admitted. *Id.* "'The improper admission of evidence is harmless error when the conviction is supported by substantial

[4] Freshwater does not challenge the State's contention that a startling event occurred or that the statements related to the event. Therefore, any determination of whether McCray's statements should be considered excited utterances depends upon the court's determination of whether McCray's statements were made while under the stress of excitement caused by the event.

independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.'" *Mathis*, 859 N.E.2d at 1280 (quoting *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000)).

Therefore, even if McCray's statements were not excited utterances, the admission of Officer Smith's testimony was harmless error because Freshwater was not harmed by the admission of Officer Smith's testimony, as it was merely cumulative of other evidence admitted at trial which established the facts surrounding the robbery. First, McCray testified that Freshwater came into her home on the night in question and asked her for money while holding a knife in his hand, and that the presence of the knife "worried" her. Second, a recording of the 911 call was admitted into evidence in which McCray could be heard telling the dispatcher "[H]e walking around with a knife … talking about he'll kill us if we don't give him some money." Ex. 6-Transcript p. 2. Next, McCray's written statement and statements to Detective Sharp concerning the facts surrounding the robbery were admitted with no objection from Freshwater.[5] Finally, Rogers testified to McCray's statements with no objection from Freshwater. Because the substance of the disputed testimony is merely cumulative of other evidence placing Freshwater at the scene, with a knife, demanding money, we conclude that any error

[5] We note that Freshwater contends that because McCray's victim statement was composed over a period of roughly thirty minutes, the statements in McCray's written victim statement were not spontaneous statements, but rather were responses to Officer Smith's questions. However, even if this were true, to the extent that Freshwater raises this contention on appeal, it is waived because Freshwater's trial counsel, who was not his appellate counsel, did not object to the admission of McCray's written victim statement at trial.

which may have occurred as a result of the admission of Officer Smith's testimony was harmless.

II. Residential Entry

Freshwater next contends that the trial court erred by denying his motion for a directed verdict with respect to the residential entry charge because the State failed to disprove his defense that McCray had consented to his entering her apartment beyond a reasonable doubt. "For a trial court to appropriately grant a motion for a directed verdict, there must be a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict and susceptible only to an inference in favor of the defendant's innocence." *Proffit v. State*, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004), *trans. denied*. "If the evidence is sufficient to sustain a conviction upon appeal, then a motion for directed verdict is properly denied." *Id.* "Thus, our standard of review is essentially the same as that upon a challenge to the sufficiency of the evidence." *Id*.

"Upon review of claims of insufficient evidence, we neither reweigh evidence nor judge witness credibility." *Id*. "We will instead consider only the evidence which supports the conviction and the reasonable inferences to be drawn therefrom in order to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt." *Id.*

On appeal, Freshwater challenges the trial court's denial of his motion for a directed verdict on the residential entry charge, claiming that the State failed to disprove his defense that he had consent to enter McCray's residence. "The offense of residential

entry is committed by '[a] person who knowingly or intentionally breaks and enters the dwelling of another person.'" *McKinney v. State*, 653 N.E.2d 115, 117 (Ind. Ct. App. 1995) (quoting Ind. Code § 35-43-2-1.5)). "In order to establish that a breaking has occurred, the State need only introduce evidence from which the trier of fact could reasonably infer that the slightest force was used to gain unauthorized entry." *Young v. State*, 846 N.E.2d 1060, 1063 (Ind. Ct. App. 2006). The opening of an unlocked door is sufficient. *Id*. The element of breaking may be proved entirely by circumstantial evidence. *McKinney*, 653 N.E.2d at 117.

Lack of consent is not an element of residential entry. *Holman v. State*, 816 N.E.2d 78, 81 (Ind. Ct. App. 2004), *trans. denied*. Rather, the defendant has the burden of raising consent as a defense. *Id*. Once the defense is raised, the State has the burden of disproving the defense beyond a reasonable doubt. *Id*. A defendant's belief that he has permission to enter must be reasonable in order for him to avail himself of the defense of consent. *Id*.

Here, the uncontested evidence clearly establishes that McCray had given Freshwater broad consent to enter her residence and that she had no problem with him visiting her residence. The record further establishes that McCray had given Freshwater a key to her residence and that she had never restricted Freshwater from visiting at any time of day. While we recognize that McCray made statements to Officer Smith that Freshwater "did not knock" before entering her residence and that he "just came through the door," we are unpersuaded that these statements alone indicate that McCray's consent for Freshwater to enter her residence had been limited in any way. Tr. pp. 141 & 143.

Because the State presents no evidence suggesting that the broad consent granted by McCray to Freshwater to enter her residence was limited in any way, we conclude that the State failed to disprove Freshwater's consent defense by a reasonable doubt and that the evidence at trial was insufficient to support Freshwater's residential entry conviction.

The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded with instructions to the trial court to vacate Freshwater's judgment of conviction on the residential entry charge.

MAY, J., and BARNES, J., concur.